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No. 95-

In the Supreme Court of the United States

OCTOBER TERM, 1995

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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78 pp

QUESTION PRESENTED

In this case, the court of appeals upheld a federal ban on the broadcast of advertising concerning lawful casino gaming. The question presented is:

Whether governmental restrictions on truthful, non-misleading commercial speech may be upheld where the government failed to provide evidence that such restrictions materially advance any legitimate goal or are narrowly tailored to do so, and where the reviewing court, rather than demanding such evidence and making an independent inquiry regarding the effectiveness and scope of the restrictions, relied instead upon speculation and conjecture to uphold them.

RULE 29.6 STATEMENT

The parties to the proceeding in the court below are named in the caption. None of the corporate parties have a parent company or a non-wholly owned subsidiary.

Greater New Orleans Broadcasters Association ("GNOBA"), a non-profit corporation, has filed this document on behalf of its members, which are listed below. None of the corporate members of the GNOBA has a parent company or a non-wholly owned subsidiary.

KMEZ-FM WWL-AM
WLMG-FM\WSMB-AM
River City Broadcasting
1450 Poydras Street
Suite 440
New Orleans, LA 70112

WBOK-AM 1230
Christian Broadcasting Corp.
1639 Gentilly Boulevard
New Orleans, LA 70119

WBYU-AM 1450
EZ Communications
1515 St. Charles Avenue
New Orleans, LA 70130

WCKW-FM 92.3
WCKW-AM 1010
222 Corporation
3501 N Causeway Blvd.
Suite 700
Metairie, LA 70002

WDSU-TV Channel 6
Pulitzer Broadcasting Co.
846 Howard Avenue
New Orleans, LA 70113

WEZB-FM 97.1
WRNO-FM 99.5 FM
EZ Communications
201 St. Charles Ave. Ste 201
New Orleans, LA 70130

WGNO-TV Channel 26
Tribune Broadcasting
#2 Canal Street
New Orleans, LA 70130

WLTS-FM 105.3
WTKL-FM 95.7
Phase II Communications
3525 N. Causeway Blvd
Suite 1053
Metairie, LA 70002

WNOE-FM 101.1
KLJZ-FM
Radio Equity Partners
529 Bienville Street
New Orleans, LA 70130

WNOL-TV Channel 38
Quincy Jones Broadcasting, Inc.
1661 Canal Street
New Orleans, LA 70112

WVUE-TV Channel 8
S F Broadcasting
1025 South Jeff Davis Pkwy.
New Orleans, LA 70125

WWL-TV Channel 4
A. H. Belo Corporation
1024 North Rampart
New Orleans, LA 70116

WQUE-FM 93.3
WODT-AM 1280
WYLD-AM/FM
ClearChannel Communications, Inc.
2228 Gravier Street
New Orleans, LA 70119

WZRH-FM 106.1
HowesBroadcasting Corporation/
Dr. Randolph Howes
1601 Shortcut Road
Slidell, LA 70458

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 69 F.3d 1296 (5th Cir. 1995). The opinion of the district court (Pet. App. 19a) is reported at 866 F. Supp. 975 (E.D. La. 1994).

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1995, and a timely petition for rehearing *en banc* was denied on January 23, 1996. (Pet. App. 40-41a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Federal criminal statute 18 U.S.C. § 1304 authorizes criminal prosecution and sanctions for the broadcast of "any advertisement of or information concerning any lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or part upon lot or chance . . . ." A corresponding Federal Communications Commission ("FCC") regulation, 47 C.F.R. § 73.1211, authorizes additional sanctions ranging from forfeiture to broadcast license revocation.

STATEMENT OF THE CASE

1. Preliminary statement.

The circuit court below, ignoring this Court's clear precedents, upheld suppression by the federal government of truthful, non-misleading broadcast advertising concerning lawful gaming activities without demanding or scrutinizing any evidence justifying the scope or demonstrating the effectiveness of the suppression of such speech. Instead, the court shirked its obligation under the First Amendment by explicitly deferring to Congress and by relying upon speculation supplied by counsel for the government.

The regulatory scheme at issue is federal criminal statute 18 U.S.C. § 1304 and its corresponding Federal Communications Commission ("FCC" or "Commission") regulation, 47 C.F.R. § 73.1211, which was enacted over fifty years ago as section 316 of the Communications Act of 1934. Pet. App. 35-39a. Over the years, this set of speech restrictions has been subjected to haphazard revisions, embodied in a myriad of contradictory exceptions and exemptions, that have robbed the restrictions of any legitimate effect Congress may have intended. The hollow framework that remains in the wake of the evisceration of § 1304 and § 73.1211 crumbles under scrutiny. It is a confusing gridwork of arbitrary and inconsistent exceptions designating who may speak, who may not speak and what may or may not be said, thus creating an absurd categorization of speakers that is totally inconsistent with the equality components of the First Amendment. But broadcasters are still targeted by this regulatory scheme and must grapple daily with the Commission's arcane and unfathomable interpretation of

the rules -- often contained in unpublished opinion letters by the Commission staff -- in an effort to avoid monetary forfeitures, revocation of their broadcast licenses, and potentially, criminal sanctions.

Despite the facially inconsistent and discriminatory nature of the remaining vestiges of the government's ban on gaming advertising, a majority of the circuit court panel that reviewed this case did not require that the FCC or the United States of America (collectively, the "Government") justify this statutory scheme with concrete evidence. Indeed, the Government has presented no evidence explaining why a ban on truthful speech by the broadcast media is necessary to protect the public, when no such ban is imposed on any other communications medium. Nor has the Government produced evidence that the ban is effective in providing such protection or that would justify the laundry list of exceptions that have been carved out of the ban. The Government has not evaluated alternatives to the ban and has presented no evidence that would reconcile the ban with the valid interests of the twenty-two states that have legalized gaming. In sum, the panel majority shunned the First Amendment and allowed the Government to substitute conjecture where this Court consistently requires concrete evidence. Pet. App. 10-14a.

In reality, the reason the Government presented no evidence to support its ban on truthful advertising about legal, state-licensed gaming is that there simply is none. The abundance of arbitrary exceptions has stripped the ban of any legitimate effect or of any possible justification. This Court's precedents dictate the only conclusion possible under these circumstances -- the remnants of the ban on gaming advertising violate the First Amendment.

2. Regulatory scheme and impact of the advertising ban.

Petitioner, the Greater New Orleans Broadcasters Association ("GNOBA"), is a non-profit trade association which represents twenty-six television and radio stations in the New Orleans area in matters affecting the broadcast industry. The remaining petitioners are several GNOBA members (collectively "Broadcasters"). Fearing criminal prosecution or substantial sanctions pursuant to 18 U.S.C. § 1304 or § 73.1211, Broadcasters have refrained from broadcasting those types of advertising for casino gaming which may conflict with the FCC's latest interpretations of the ban on advertising that those statutes impose.

Section 1304 authorizes criminal prosecution and sanctions for broadcasts of commercial messages about gaming. 18 U.S.C. § 1304 (Pet. App. 35a). The corresponding FCC regulation, 47 C.F.R. § 73.1211 (Pet. App. 38a), imposes additional sanctions, ranging from monetary forfeitures to broadcast license revocation. The regulatory scheme bans the broadcast of "any advertisement of or information concerning any lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . ." *Id.* The ban has no application to non-broadcast media, which are free to disseminate any information regarding any form of gaming.

The Government's advertising ban has been interpreted to provide that a lottery exists where three elements are present: prize, chance, and consideration. *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S. Ct. 593, 98 L. Ed. 699 (1954); *National Association of Broadcasters, Contests, Lotteries & Casino Gambling,*

1995, p. 6 (hereinafter, NAB). A broadcaster evaluating an advertisement for the presence of lottery information must individually interpret each lottery element. For example, the FCC has ruled that visual or aural references to gaming devices, such as slot machines or gaming tables, must be edited out of broadcast casino advertising. Indirect references to most gaming activities, regardless of their subtlety, are also impermissible under the Government's ban.

The scope of the ban has gradually been eroded by Congressional approval, beginning in 1950, of a hodgepodge of exceptions, rendering it contradictory and awkward to the point of absurdity. Under numerous circumstances, these exceptions actually permit what the regulatory scheme explicitly forbids, namely the broadcast of advertising for gaming activities. For example, if the gaming activity featured in a particular advertisement serves a charitable purpose and is sponsored by a non-profit group or a governmental entity, then, regardless of any generally-applicable governmental concerns regarding the effects of gaming on the public, the advertisement may be broadcast. 18 U.S.C. 1307(a)(2)(A) (1988); 47 C.F.R. § 73.1211 (Pet. App. 35-39a). The Government also permits the public to hear and see broadcast advertising for casinos operated by Native Americans pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et. seq., without any restrictions on the content of such advertising. 47 C.F.R. § 73.1211 (Pet. App. 39a). In addition, even though fishing contests, sporting events or contests, state-operated lotteries, and occasional and ancillary lotteries conducted by commercial organizations other than casinos all constitute full-blown lotteries under the Government's interpretation of its ban, the Government does not suppress the broadcast of advertising for those events. 18 U.S.C. §§

1305 (1950), 1307(d) (1988), 1307(a)(1) (1988), 1307(a)(2)(B) (1988); 47 C.F.R. § 73.1211 (Pet. App. 35-39a). Each of these statutory exceptions includes an idiosyncratic array of additional limiting factors. For example, the "commercial organization" exception embodies four additional criteria, which demand further interpretation by broadcasters subject to the ban. First, the advertised lottery must be authorized or not otherwise prohibited by the state in which it is held. Second, the advertisement must be of a promotional nature. Third, the advertisement must be clearly occasional to the operation of the sponsoring business. Fourth, the advertisement must be ancillary to the primary purpose of the business. These additional exceptions further contribute to the complexity and incomprehensibility of the statutory scheme. Pet. App. 36a.

In spite of these myriad exceptions to the ban, the Government maintains that the broadcast advertising of lawful gaming at heavily-regulated, state-licensed casinos triggers a unique concern for protecting the public that is not implicated by other forms of gaming and that justifies a continued nationwide broadcasting ban. But even assuming that such a special concern is warranted, it cannot be addressed by the Government's regulatory scheme, because even those remaining fragments of the ban that address casino gaming advertising have been diluted with yet another layer of exceptions. With respect to such advertising, the government assumes the role of advertising copy editor and, while striking some references to casino gaming, permits the public to hear other references. For example, broadcasters, regardless of where they are located, may air commercials that advertise the existence of casinos, but may only use the word "casino" where it is part of the formal name of a business entity. NAB, *supra*,

p.5, n.3. Furthermore, broadcasters can freely advertise and promote non-gaming activities at casinos, including promotional events that mimic gaming by featuring drawings, prizes, giveaways and other similar entertainment. *Id.* But as soon as such advertising even hints at what everyone must certainly know -- that gaming occurs at casinos -- the Government's censor steps in to ban the broadcast of the advertising.

In the face of this complex ban, broadcasters must meticulously scrutinize gaming advertising before it is aired. The subtleties of the ban and the numerous opinions by the Commission staff which attempt to interpret it are such that broadcasters must routinely employ legal counsel to edit advertising copy. Those counsel must, in turn, consider a bewildering, often contradictory array of informal, published and unpublished letter rulings. A simple, but typical, example captures the baffling nature of this regulatory scheme. The FCC has stated that a promotional event sponsored by a casino, such as a drawing for a prize, that requires no purchase by participants but that requires a substantial expenditure of their time and effort includes the essential lottery element of consideration and may not be advertised on the air. (Of course, under the various exceptions to the ban, broadcasters could air advertising for an identical event if it were sponsored by virtually any non-casino entity.) The FCC has said that consideration is present when a participant must take the time to visit several stores in a mall as part of a such an event. NAB, *supra*, p. 9. But, strangely, consideration is <u>not</u> present where a participant must drive ninety miles in order to take part. *Id.* at p.10 n.4. There is no Commission pronouncement regarding how many miles a participant must be required to drive or how much time he must be required to expend -- essential

issues in states such as Louisiana where casinos may be widely dispersed -- before the Government deems that consideration is present and the event may not be advertised on the air. And yet, despite the continual guess work in which broadcasters must indulge in rder to interpret the FCC's cryptic guidance, broadcasters are routinely held responsible for wrong decisions.

3. Decisions of the district court and the court of appeals.

On February 25, 1994, Broadcasters, seeking declaratory and injunctive relief, challenged the constitutionality of § 1304 and § 73.1211 to the extent they ban broadcast of advertising for legal casino gaming. In opposing the action, the Government presented no evidence justifying the scope or effectiveness of its ban. Nevertheless, on November 30, 1994, the district court entered a summary judgment in favor of the Government, holding that the ban does not violate the First Amendment. Pet. App. 31a. Broadcasters appealed the district court judgment to the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. By a two-to-one vote, a three-judge panel of the court of appeals affirmed.

The panel majority first classified the subject gaming advertising as commercial speech, entitled "to only limited protection under the First Amendment." Pet. App. 5a. The majority then undertook to apply the four-part *Central Hudson* test for reviewing commercial speech restrictions. *Id.* The Government conceded that Broadcasters' advertising satisfies the first *Central Hudson* prong because it concerns lawful gaming and is not misleading. Pet. App. 6a. The panel majority then considered the Government's asserted interests --

discouraging public participation in gaming and assisting states which prohibit gaming by regulating interstate aspects of gaming -- and finding these interests substantial, proceeded to *Central Hudson*'s third and fourth prongs. Pet. App. 10a.

In considering whether the suppression of gaming advertising directly advances the Government's asserted interests, the panel majority, without addressing the Government's burden of proof, declared that it is "axiomatic that the purpose and effect of advertising is to increase consumer demand," and cited Broadcasters' "vigor" in attacking the ban as confirmation of the "efficacy of the prohibition." *Id.* Notwithstanding the ban's numerous and contradictory exceptions, the panel majority found that "section 1304 easily satisfies the third prong of the *Central Hudson* test." Pet. App. 12a. The panel majority briefly addressed *Central Hudson*'s fourth prong, finding that the broadcast advertising ban was not more extensive than necessary, because it prohibited "only broadcast advertising aimed at the promotion of casino gambling." *Id.* Moreover, the panel majority brushed aside the numerous exceptions to the ban, declaring simply that Congress' failure to eliminate the remnants of the ban affecting broadcast advertising of casino gaming amounted to a "governmental choice," and that elimination of those remnants was not "constitutionally mandated." Pet. App. 13a.

In his dissent, Chief Judge Politz found the current regulatory scheme so "riddled with . . . inconsistencies and exceptions" that the result was "suppression of speech without adequate justification." Pet. App. 14a. Judge Politz found that the broadcast advertising ban cannot possibly advance an interest in suppressing public

participation in gaming, pointing out that "irrational regulatory scenarios in which certain provisions undermine and counteract the asserted government interest do not satisfy the 'material advancement' prong of the *Central Hudson* test." Pet. App. 16a. Furthermore, Judge Politz found that, given the unrestricted advertising of casino gaming in non-broadcast media, the remaining ban on broadcasting this same advertising amounts to "little more than a gratuitous suppression of expression." Pet. App. 17a. Although Judge Politz acknowledged that the government is not required to make progress on every front in advancing its interests, he nevertheless found the ban "so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest," and concluded that the Government had not met its burden of proving material advancement of its interest. *Id.* He also pointed out that the Government's asserted interest in aiding policies of non-gaming states conflicts with the substantial federal interest, recognized by this Court in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993), in carefully balancing the policies of both gaming and non-gaming states. Pet. App. 18a. Judge Politz concluded that, when the substantial interest in balancing varying state policies is considered, it becomes apparent that a less restrictive alternative to the ban exists, one that would allow broadcasters in states that permit gaming to broadcast gaming advertising, while prohibiting the broadcast of such advertising by broadcasters in non-gaming states. *Id.*

Notwithstanding Judge Politz's findings, the panel majority upheld the advertising ban and affirmed the district court's judgment. Pet. App. 14a. Broadcasters'

subsequent petition for rehearing was denied. Pet. App. 40-41a.

REASONS FOR GRANTING THE PETITION

This case strikes at the heart of the principle that the government of a free people cannot suppress ideas or information concerning lawful activities solely on the basis of a paternalistic belief that they concern matters the government deems to be socially harmful. The First Amendment requires the government to justify any suppression of such speech by identifying its purpose, showing how it serves that purpose, and demonstrating that its scope is not unnecessarily broad. The panel majority, although bound to defend this principle, failed to do so. Instead, the majority ignored this Court's precedents and imposed a standard of review that threatens to deprive the First Amendment of any meaning in the context of commercial speech.

The panel majority did not require the Government to present evidence to explain why a nationwide ban on the broadcast of gaming advertising is necessary, nor did it require the Government to show how the ban is effective or properly tailored to its purpose. Instead, the panel majority abdicated its judicial role, deferring to speculation by counsel for the Government regarding "legislative judgment" and ignoring the existence of a less restrictive and constitutionally sound alternative to the nationwide ban. Pet. App. 11a. The panel majority's approach is contrary to this Court's precedents and represents an alarming departure from the protection heretofore afforded to commercial speech. Because the danger embodied in the majority's opinion is so

fundamental and sweeping in scope, this Court should act to correct it.

The danger presented by the panel majority's opinion is made more acute by the fact that this case is the first of a group of similar cases concerning gaming advertising that are pending in the federal circuits, and, as such, it stands as a deeply flawed precedent. The same issues raised in this case are now before the Court of Appeals for the Ninth Circuit in *Valley Broadcasting Co. v. United States*, Case No.: 93-16191, on appeal from the Nevada District Court, which held that the Government's ban on broadcast gaming advertising is unconstitutional. *Valley Broadcasting Co. v. United States*, 820 F. Supp. 519 (D. Nev. 1993). The Ninth Circuit has yet to issue a decision despite having heard oral argument more than a year ago. The same issues are also pending in a case before the District Court for the Southern District of Mississippi, which will be bound to adhere to the panel majority's opinion, unless this Court acts. Meanwhile, several states have passed laws legalizing casino gaming, making review of the Government's advertising ban necessary in order to provide proper guidance to the lower courts.

I. THE PANEL MAJORITY'S COMPLETE FAILURE TO PROPERLY APPLY *CENTRAL HUDSON* AND ITS PROGENY MAKES REVIEW BY THIS COURT ESSENTIAL.

The panel majority's opinion constitutes a gross misinterpretation of this Court's jurisprudence concerning commercial speech that, if permitted to stand, will seriously erode the protection this Court has afforded to truthful commercial speech by substantially lowering the

standard of evidentiary sufficiency developed by the Court since it extended First Amendment protection to commercial speech in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). The majority has improperly permitted the Government to rely upon speculation that the arbitrary and discriminatory ban protects the public and supports the policies of non-gaming states, without demanding a show of evidence of the scope or effectiveness of the ban. Pet. App. 10-14a. If permitted to stand, the majority's decision will sow confusion about the proper standard for courts to apply in scrutinizing restrictions on commercial speech, and will invite lower courts before which such cases are currently pending to complete the evisceration of the *Central Hudson* standard that the panel majority began. For these reasons, this Court should grant review.

A. The panel majority improperly relied on speculation concerning Congressional intent, when confronted with no evidence to support the ban.

In the commercial marketplace, the general rule is that the speaker and the audience, not the government, assess the value of information presented. *Edenfield v. Fane,* 507 U.S. 761, 767, 113 S. Ct. 1792, 1798, 123 L. Ed. 2d 543 (1993). The critical importance of this rule in a free society has led this Court to require that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 71 n.20, 103 S. Ct. 2875, 2883 n.20, 77 L. Ed. 2d 469 (1983). Thus, the heart of a court's role in evaluating a governmental restriction on truthful commercial speech is to determine whether the facts in the record justify the restriction. Courts must

subject such speech restrictions to the probing scrutiny mandated by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341 (1980):

> For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In this case, the panel majority attempted to apply *Central Hudson* in an evidentiary vacuum. The Government did not provide and the majority did not demand evidence to justify the theory that the nationwide ban on broadcast gaming advertising is necessary or appropriate to further any asserted interest. Instead, the panel majority improperly deferred to Congress -- in essence, transforming the Government's burden of proof under *Central Hudson* into a presumption of validity. The majority simply stated that, "Congress has singled out particular forms of gambling for which broadcast advertising is permitted, and in so doing made legitimate, quintessentially legislative choices . . . ." Pet. App. 11a. Such sweeping deference to Congressional action finds no support in the jurisprudence interpreting the First Amendment. The majority's language establishes that it evaluated the Government's arguments under a deferential standard more appropriately reserved for cases arising

under the Commerce Clause. Indeed, the majority found support for the asserted federal interest in nationwide suppression of speech about casino gaming in cases that involved non-speech activities regulated by Congress under the Commerce Clause rather than the First Amendment. See Pet. App. at 8a and n.3.

But restrictions on commercial speech, as opposed to restrictions on other commercial activities, are subject to a much more demanding standard of review than that imposed by the panel majority. Courts are required to carefully scrutinize every asserted justification for suppression of such speech, notwithstanding any legislative findings. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 1543, 56 L. Ed. 2d 1 (1978). Here, legislative deference was not only impermissible, it was impossible, because the Government presented no evidence of legislative findings to support the restrictions at issue. Thus, there was simply nothing to which the panel majority could defer, even if such deference were permitted under this Court's precedents. Indeed, the majority ignored the fact that this Court has struck down restrictions on speech under circumstances such as these, where legislative findings are absent. See e.g. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129, 109 S. Ct. 2829, 2838, 106 L. Ed. 2d 93 (1989).

The requirement that courts engage in an independent and searching examination of any asserted basis for suppression of truthful commercial speech is vital, because, as this Court has acknowledged, without such scrutiny, the government could "with ease restrict commercial speech in the service of other objectives that

could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, --- U.S. ----, 115 S. Ct. 1585, 1592, 131 L. Ed. 2d 532 (1995), quoting *Edenfield,* 507 U.S. at 770, 113 S. Ct. at 1800. This established and fundamental principle is not altered when a court is confronted with suppression of commercial speech concerning activities that are purported to be "socially harmful." *Rubin,* --- U.S. at ----, n.2, 115 S. Ct. at 1589, n.2. Simply put, in every case such as this one, a court must bring to bear its "independent judgment" of the evidence presented. *Sable*, 492 U.S. at 129, 109 S. Ct. at 2838. The panel majority actively resisted this Court's explicit requirement in *Rubin* that it impose the same level of careful scrutiny for commercial speech restrictions affecting activities purported to be socially harmful as that imposed with respect to any other commercial speech restrictions. The majority opined wishfully that imposition of a minimal standard of review with respect to speech concerning activities deemed by the government to be socially harmful would supply a "seldom attained and too seldom even prized," clear constitutional test. Pet. App. 14a. But this Court has provided the panel majority with a "clear constitutional test" in *Central Hudson* and its progeny, and the panel majority has steadfastly refused to apply it. Pet. App. 10-14a. In so doing, the majority has rendered an opinion that poses a significant threat to free speech in the marketplace and beyond.

The panel majority engaged in forbidden "speculation and conjecture" in upholding the Government's ban. *Rubin,* --- U.S. at ----, 115 S.Ct. at 1592. Faced with a complete lack of evidence to support the ban, the majority supplied its own rationale in order to do so. The majority simply concluded that it is "axiomatic" that a statute that suppresses advertising about

casino gaming -- even a statute that affects only one advertising medium and is riddled with arbitrary exceptions -- will somehow reduce the demand for casino gaming. In fact, the majority essentially determined that the effectiveness of the ban is self-proving, because "the vigor with which the statute has been challenged confirms the efficacy of the prohibition." Pet. App. 10a.

The panel majority's review of the Government's ban is conspicuously inadequate. This Court has consistently required much more vigorous scrutiny than that undertaken by the panel majority. This Court's decision in *Turner Broadcasting System, Inc. v. FCC*, --- U.S. ----, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (plurality opinion), illustrates the rigorous nature of the test imposed by the First Amendment when the government acts to censor truthful commercial expression.

In *Turner*, this Court considered whether the must-carry provisions of the 1992 Cable Act violated the First Amendment rights of cable television operators. *Turner*, --- U.S. at ----, 114 S. Ct. at 2468. In enacting the law, Congress had relied upon a study prepared by the FCC reportedly supporting a conclusion that the must-carry rules were necessary. Without a hint of deference to the FCC or Congress, the Court in *Turner* instituted its own independent review of the "unusually detailed statutory findings" provided in support of the rules. *Id.* at 2461. Despite the government's detailed "findings," the Court determined that "[o]n the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied" its burden of showing that the rules would not burden more speech than necessary. *Id.* at 2470. In the absence of more "predictive or historical evidence upon

which Congress relied, or the introduction of some additional evidence," the Court declared the restrictions invalid. *Id.* at 2472.

Here, in startling contrast, the panel majority failed to demand production of any legislative or other findings, or any other evidence, to justify the Government's arbitrary suppression of certain commercial speech by certain speakers. Instead, the majority simply concluded that Broadcasters' challenge of the ban on broadcast gaming advertising, coupled with speculation by counsel for the Government and the panel majority itself, justified the ban. This lack of meaningful and independent scrutiny is plainly inconsistent with this Court's requirements and creates an urgent need for review by the Court.

B. The panel majority failed to require the Government to satisfy the third and fourth prongs of *Central Hudson*.

The panel majority, ignoring this Court's precedents, failed to require any showing of facts demonstrating that the nationwide ban on broadcast casino gaming advertising directly and materially advances a legitimate goal and failed to consider the existence of a less restrictive alternative that has already been found by this Court to be constitutionally sound. The majority's opinion establishes a dangerous precedent that imperils all truthful commercial speech and requires review by this Court.

1. There are no facts in the record that show the Government's ban directly and materially advances a legitimate objective.

In order to satisfy the third prong of the *Central Hudson* test, the "direct and material advancement" requirement, the Government must show facts establishing the actual effect of its suppression of speech. See *Rubin*, --- U.S. at ----, 115 S. Ct. at 1593; *Florida Bar v. Went For It, Inc.*, --- U.S. ----, ----, 115 S. Ct. 2371, 2377, 132 L. Ed. 2d 541 (1995); *Ibanez v. Florida Dept. of Business and Professional Regulation*, --- U.S. ----, ---- & n.10, 114 S. Ct. 2084, 2090 & n.10, 129 L. Ed. 2d 118 (1994); *Edenfield*, 507 U.S. at 772-75, 113 S. Ct. at 1801-03; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95-96 & n.10, 97 S. Ct. 1646, 1619-20 & n.10, 52 L. Ed. 2d 155 (1977). The Government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Rubin*, --- U.S. at ----, 115 S. Ct. at 1592. The Government's burden is therefore far more substantial than that suggested by the panel majority's decision. When the Government defends a regulation on speech "as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner*, --- U.S. at ----, 114 S. Ct. at 2470, quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. 1985). Here, the Government did no more than generally assert purported harms of casino gaming, and the panel majority required nothing more, thereby ignoring the consistent pronouncements of this Court.

The panel majority began its analysis of the "direct advancement" prong by concluding that the mere fact that Broadcasters had mounted a legal challenge to the ban

satisfied the Government's burden of proof. Pet. App. 10a. If the Government's burden were, in fact, so meager, the "direct advancement" prong would be reduced to mere surplusage, because it would be satisfied anytime a citizen dared to assert in a court his right to speak. But the Government's burden is much more weighty. The Government must show that its vestigial and arbitrary suppression of speech about gaming somehow decreases public participation in gaming. This the Government failed to do. As Chief Judge Politz observed in his dissenting opinion,

> the Government cannot show that this restriction decreases demand for casino gambling to any appreciable extent. While the Government is not required, of course, to make progress on every front in advancing its interests, this ban is so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest. I am persuaded that the Government has not met its burden of proving material advancement of its interest.

Pet. App. 17a.

The panel majority also did not address the effect of the numerous exceptions to the ban on the ban's ability to suppress gaming, in spite of the fact that this Court has held that "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination; they may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue, et al. v. Gilleo*, --- U.S. ----, ----, 114 S. Ct. 2038, 2057, 129 L. Ed. 2d 36 (1994); See also

Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993). Irrational regulatory systems which undermine and counteract the asserted governmental interest simply cannot satisfy the "direct advancement" prong of the *Central Hudson* test. *Rubin*, --- U.S. at ----, 115 S.Ct. at 1592. Where, as here, a court is faced with a regulatory scheme perforated by numerous sweeping exemptions that undermine any legitimate governmental purpose asserted, that court must demand substantial factual showings by the Government to justify the continued enforcement of the regulatory scheme in question. Here, the Government did not provide and the panel majority failed to demand any facts that would show how the discriminatory ban on certain speech concerning lawful casino gaming by certain speakers could possibly advance its asserted interests in promoting the policies of non-gaming states and suppressing public demand for gaming in general.

The irrationality of the regulatory scheme at issue here mirrors that identified by the Court in *Rubin*, where a governmental ban on beer labels indicating alcohol content was invalidated because the Court held that "anecdotal evidence and educated guesses" were insufficient to overcome the overall "irrationality of the [Government's] regulatory scheme." *Rubin*, --- U.S. at ----, 115 S. Ct. at 1593. The governmental interest in suppressing alcohol strength wars by prohibiting numerical disclosures of alcohol content conflicted with other federal regulations which permitted the disclosure of alcohol content in advertising. *Id.* at 1592-93. Numerous exemptions and inconsistencies in the beer labelling regulatory framework rendered it "irrational" and "puzzling." *Id.* at 1593. The Government's reliance upon anecdotal evidence and educated guesses and failure to present evidence showing that the disclosure of alcohol content would promote strength wars was key to the Court's finding that the restrictions were unconstitutional.

Rubin, --- U.S. at ----, 115 S. Ct. at 1593; See also *Florida Bar v. Went For It, Inc.* --- U.S. ----, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (upholding restrictions on advertising by attorneys, where the government presented a 106-page summary of a two-year study, including statistical surveys and detailed evidence).

Here, the Government offered no studies, no expert witnesses and no detailed evidence, anecdotal or otherwise, in support of its haphazard array of restrictions on speech concerning the various forms of legalized gaming. The Government was unable to explain in a coherent manner the distinction it asserted between heavily-regulated private casino gaming and other forms of gaming that are exempt from the ban, and the panel majority failed to require that such a distinction be proven. This glaring lack of evidence is not surprising. On the contrary, it is an inevitable product of the broad exceptions to the Government's regulatory scheme. "As the . . . exceptions . . . would have counteracted any effect the [broadcast gaming advertising] ban had exerted, it is not surprising that the lower courts did not find any evidence" to show how the ban either protects the public or the policies of non-gaming states. *Rubin*, --- U.S. at ----, 115 S. Ct. at 1593. That evidence simply does not exist, because the remnants of the ban are wholly ineffective to serve any interest.

Moreover, the Government failed to rebut the fact that the abundance of non-broadcast gaming advertising constitutes demonstrable evidence of the outright failure of the Government's ban to directly advance any interest at all. The Government's censorship of broadcast gaming information simply cannot isolate the consumer or keep the consumer in ignorance of the availability of gaming. The flagrant and widespread advertising of gaming occurs in every medium except over-the-air television and radio, where broadcasters must routinely hire lawyers as

advertising copy editors. This pervasive exposure of the public to gaming advertising renders the Government's vestigial ban "little more than a gratuitous suppression of expression." Pet. App. 17a.

In *Rubin*, --- U.S. at ----, 115 S.Ct. at 1592, the Court rejected the Government's assertion, supported solely by an appeal to "common sense," that any restriction on the advertising of a product will decrease the extent to which consumers select that product. Nevertheless, the panel majority in this case accepted precisely the same unsupported assertion, stating that it is "axiomatic that the purpose and effect of advertising" is to increase consumer demand. Pet. App. at 10a. Such an approach simply ignores this Court's clear direction. Even assuming the Government's interest in protecting the public from gaming is substantial, there is simply "little chance that [censoring broadcast gaming advertising] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Rubin*, --- U.S. at ----, 115 S.Ct. at 1593. This Court should strike down the panel majority's opinion to vindicate the Court's decision in *Rubin*.

2. There are no facts in the record that show that the Government's ban is narrowly tailored to serve a legitimate objective.

If the panel majority had required the appropriate showing of facts with respect to the third prong of *Central Hudson*, it, like the district court in *Valley Broadcasting*, 820 F. Supp. 519 (D. Nev. 1993), would have struck down the Government's ban without a necessity that it consider the fourth prong, the "narrowly tailored" requirement. But the panel majority did endeavor to apply the fourth prong and, in the process, it once again ignored this Court's clear command. Here again, review by this Court is urgently

needed to correct the dangerous precedent that the panel majority has set.

Even if the Government's ban did meet *Central Hudson*'s third prong, it would still not survive proper First Amendment scrutiny, because the ban is not sufficiently tailored to meet a legitimate goal. This Court's decision in *United States v. Edge Broadcasting Company*, 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993), established that the only legitimate federal interest implicated by the Government's regulatory scheme is an interest in balancing the disparate policies of the various states with respect to gaming. The Court in *Edge* was very clear. In interpreting the exception to the Government's regulatory scheme affecting state lotteries, the Court articulated the governmental interest served by the scheme not once, but nine times. See *Edge*, 113 S. Ct. at 2703, 2704, 2705, 2707 & 2708. The Court upheld the state lottery exception to the regulatory scheme on the basis that it serves this federalism interest. *Edge*, 113 S. Ct. at 2708. The state lottery exception permits broadcasters in states that operate lotteries to advertise all state-operated lotteries, but bans such advertising by broadcasters located in states that do not operate lotteries. See 18 U.S.C. § 1307(a); 47 C.F.R. § 73.1211 (Pet. App. 35-39a). A similar approach with respect to state-licensed and state-regulated casino gaming would be less restrictive than the nationwide ban currently imposed and would serve the legitimate federal interest identified by the Court in *Edge*.

Thus, the panel majority went astray in analyzing the Government's interest in assisting non-gaming states, when it declared that "no less restrictive alternative seems viable" as a less intrusive substitute for the nationwide ban. Pet. App. 13a. Because the majority ignored this Court's discussion of the ban in *Edge*, it failed to correctly identify the only legitimate federal interest implicated by the ban. As a result, the majority did not even consider the

viable alternative to the ban embodied in the Government's treatment of state lotteries, which Broadcasters presented in detail to the court. As Judge Politz pointed out in his dissent, the nationwide ban is necessarily too broad given the Government's interest in balancing state gaming policies. Because so many states allow casino gaming, "by not cabining the regulation to radio and television stations in non-casino states, the ban impinges unnecessarily on the states which have legalized casino gambling." Pet. App. 17a.

The panel majority maintained that the ban is sufficiently tailored to the Government's asserted interests, because it prohibits only *broadcast* advertising of casino gaming. Pet. App. 13a. Even assuming, *arguendo*, that the Government's asserted interests in discouraging public participation in casino gaming and in buttressing the policies of non-gaming states are legitimate, such interests cannot possibly be served by a ban that targets only broadcast advertising. If the Government truly had an interest in discouraging casino gaming, then similar speech restrictions on other communication media would be essential, for without them, the public is encouraged daily to gamble at casinos. But other similar restrictions on such speech have not been imposed by the Government. For example, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. demonstrates that the Government has never undertaken to suppress casino gaming. That act allows the very radio and television broadcasts that the ban, according to the Government, is intended to prohibit, by allowing advertising of any information whatsoever regarding casino gaming as long as the sponsoring casino is operated by Native Americans. The act also permits the broadcast of such information even where a broadcaster's signal reaches persons outside the boundaries of an Indian reservation and even in states that have not legalized casino gaming, in contravention of the Government's other asserted interest in assisting those non-gaming states.

The panel majority also cited the "extent" that public demand for casino gaming is reduced as further evidence that the ban is narrowly tailored. Pet. App. 13a. In the first place, the extent, if any, to which the demand for gaming is reduced as a result of the ban has no relevance whatsoever to the requirement that the ban be narrowly tailored. The extent to which gaming demand is suppressed speaks only to the third *Central Hudson* prong, and, as Broadcasters have already shown, there is no evidence that the ban suppresses such demand to any appreciable extent. Any reduction in public participation in casino gaming resulting from the ban has never been quantified, and the lack of evidence on this score calls into question the very purposes of the ban, while illustrating the futility of attempting to satisfy *Central Hudson*'s narrow-tailoring requirement with conjecture or anecdotal evidence.

Under the panel majority's incorrect reading of *Central Hudson*'s fourth prong, proof of narrow tailoring is simply not required. Because there exists a less restrictive, but equally effective and constitutionally sound, alternative which could advance the Government's legitimate interest "in a manner less intrusive to [Broadcasters'] First Amendment rights," the Government's ban is "more extensive than necessary" and fails *Central Hudson*'s fourth prong. *Rubin*, --- U.S. at ----, 115 S. Ct. at 1594. This Court should review the panel majority's interpretation of the narrow-tailoring requirement in order to prevent further deterioration of commercial speech protection.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, Et Al.,

Plaintiff-Appellant

v.

UNITED STATES of America and Federal Communications Commission,

Defendants-Appellees

NO. 94-30732

Appeal from the United States District Court
for the Eastern Dist.ict of Louisiana
Henry A. Politz, Chief Judge.
(CA-94-656-C)

Argued July 11, 1995

Decided November 30, 1995

Before JONES and PARKER, Circuit Judges, and POLITZ, Chief Judge.

Affirmed by published opinion. Judge JONES wrote the opinion, in which Judge PARKER joined and Judge POLITZ dissented.

OPINION

EDITH H. JONES, Circuit Judge:

Greater New Orleans Broadcasters Association (GNOBA) and a group of television and radio stations in the New Orleans metropolitan area (collectively "the Broadcasters") unsuccessfully challenged in district court the constitutionality of a federal statute prohibiting the broadcast of radio and television advertisements for casino gambling. 18 U.S.C. § 1304. While recognizing that the advertisements were entitled to limited protection under the First Amendment, the district court concluded that the governmental interests served by the statute were sufficient to override the First Amendment under the Supreme Court's commercial speech jurisprudence. We affirm.

BACKGROUND

GNOBA is a non-profit corporation organized for the purpose of representing its membership as a trade association in matters affecting the broadcast industry. Each member broadcaster of GNOBA is licensed to a primary place of business in Louisiana. The members want to broadcast advertisements for casino gambling activities, which are licensed and legal in Louisiana and in neighboring Mississippi, but have refrained from doing so for fear of criminal prosecution and sanctions pursuant to 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211, the corresponding FCC regulation.

Section 1304 prohibits broadcast advertising of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance...." 18 U.S.C. § 1304. In February 1994, the Broadcasters filed suit against the United States and the FCC seeking declaratory and injunctive relief permitting them to broadcast gambling advertisements for Louisiana and Mississippi casinos. The Broadcasters first asserted that section 1304 is inapplicable because casino gambling is not a "lottery, gift enterprise, or similar scheme" for purposes of the statute. Alternatively, the Broadcasters contended that section 1304 is an unconstitutional abridgement of their First Amendment free speech rights. The Broadcasters and the government each moved for a summary judgment.

In November 1994, the district court entered summary judgment in favor of the government. Citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), the court concluded that casino advertising falls within the purview of section 1304. The court then determined that under the four-part test set forth in *Central Hudson Gas & Electric Corp. v.*

Public Serv. Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), section 1304 is a permissible regulation of commercial speech. The Broadcasters now appeal from both holdings.

DISCUSSION

[1] The Broadcasters renew their contention that section 1304 does not prohibit advertisements for casino gambling because casino games cannot be considered a "lottery, gift enterprise or similar scheme." However, this argument is foreclosed by Supreme Court precedent. In *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), the Court held that the three essential elements of section 1304 are 1) the distribution of prizes, 2) according to chance, 3) for a consideration. *Id.* at 290, 74 S.Ct. at 598. Rather than disputing that casino gambling possesses these three essential elements, the Broadcasters ignore this authority entirely.

Instead, the Broadcasters choose to attack the historical underpinnings of the statute in an attempt to demonstrate that the statute was never intended to apply to casino gambling. Apparently, the Broadcasters are laboring under the misperception that this court is free to reject statutory interpretations handed down by the Supreme Court. This we cannot do. As the Broadcasters point out, section 1304 is becoming increasingly riddled with exceptions to its broad application, *see infra* note 4. That legislation has been proposed, and rejected, by Congress which would have excepted broadcast advertisements for casino gambling from section 1304's

reach,[1] reaffirms the Court's broad interpretation of section 1304 in *American Broadcasting*. Therefore, section 1304 is applicable and continues to ban the desired advertising. *Accord Valley Broadcasting Co. v. U.S.*, 820 F.Supp. 519, 524 (D.Nev.1993).

[2] Turning to the constitutionality of section 1304, the proposed advertisements fall within the Supreme Court's definition of commercial speech because they involve "expression related solely to the economic interests of the speaker and its audience" and do "no more than propose a commercial transaction." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976).

[3, 4] "[C]ommensurate with its subordinate position in the scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978), commercial speech is entitled to only limited protection under the First Amendment.

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

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[1] *See* 134 Cong.Rec. 12,278-82 (1988); 134 Cong.Rec. 31,073-76 (1988).

Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351. Applying the four-part *Central Hudson* test to the facts at hand is the crux of this case.

The first prong, whether the speech concerns lawful activity and is not misleading, is not in dispute. The government concedes that the Broadcasters seek only to broadcast truthful advertising about lawful casino gambling activities. The broadcasters have chosen to center their argument on the second prong--the nature and substantiality of the federal government's interest in prohibiting broadcast advertisements of casino gambling.

[5, 6] The government asserts two interests it contends are substantial. First, section 1304 serves the interest of assisting states that restrict gambling by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate. The second asserted governmental interest lies in discouraging public participation in commercial gambling, thereby minimizing the wide variety of social ills that have historically been associated with such activities. The district court found both of these interests to be substantial. We agree.[2]

[7] The Broadcasters assault the federal interests in a number of ways. First, the Broadcasters attempt to characterize *United States v. Edge Broadcasting*

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[2]The government may permissibly assert that multiple interests are served by a given statute, only one of which need be substantial. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71-73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983). Further, "the insufficiency of the original motivation does not diminish other interests that the restriction may now serve." 463 U.S. 60, 71-73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469. *Id.* at 71, 103 S.Ct. at 2883. *See also Doe v. Bolton*, 410 U.S. 179, 190-91, 93 S.Ct. 739, 746-47, 35 L.Ed.2d 201 (1973) (a State may readjust its views and emphases in light of modern knowledge). Even if one of the government's arguments falters, the other can support the statute.

Co., ____ U.S. ____, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), as precluding the assertion of any substantial federal interest other than protecting state choice in gambling decisions. *Edge* makes no such broad claim. That case interpreted a companion provision to section 1304, which expressly permits advertising of state-run lotteries by broadcasters in states where the lotteries exist, while prohibiting it by non-lottery-state broadcasters. *Edge* surely determined that the government interest in protecting state choice in gambling decisions is substantial, a holding which applies here. But just as surely, it did not determine the limit of a valid federal governmental interest. *Edge* in no way suggests that the general prohibition on casino gambling advertising was rendered doubtful by the Court's approval of a "state choice" advertising policy for state lotteries. *Edge* supports rather than impairs the constitutionality of section 1304.

[8] Audaciously, the Broadcasters next challenge the federal government's interest in limiting the promotion of certain forms of gambling by means of interstate commerce. The validity as well as substantiality of the federal interest is regulating gambling's interstate manifestations, are, however, as old as the legislation prohibiting use of the federal mails for advertising state-chartered lotteries. Act of July 12, 1876, ch. 186 § 2, 19 Stat. 90, upheld in *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1877). *See also Champion v. Ames*, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903) (*Lottery Case*), sustaining under the commerce clause a federal law prohibiting interstate transportation of lottery tickets. Act of March 2, 1895, ch. 191, 28 Stat. 963. As recently as 1986, this court rejected the argument that changing mores, which have led more states to legalize various forms of gambling, should eliminate the federal

interest in prosecuting violations of the federal law prohibiting interstate transportation of lottery paraphernalia. *United States v. Stuebben*, 799 F.2d 225 (5th Cir. 1986). Here the vehicle of commerce is the interstate airwaves and the commerce consists of casino gambling advertisements offered by the Broadcasters. Because Congress has the power to legislate with regard to the use of organs of interstate commerce, it has the power to determine the ends served by that power and whether federal policy will promote or inhibit the states' policies on similar subjects.[3]

[9] The Broadcasters also attack the governmental interest in discouraging public participation in commercial gambling on federalism grounds. They contend that the federal government may not assert an interest in the public's health, safety, and welfare that is contrary to state policy. In other words, the federal government has no interest in discouraging casino gambling if Louisiana has legalized it. This argument is contrary to Supreme Court precedent.[4] The Court has

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[3]In *The Lottery Case*, Justice Harlan summed up the authorities as holding that "the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government ...; that such power is plenary, complete of itself, and may be exerted by Congress to its ultimate extent, subject *only* to such limitations as the Constitution imposes...." 188 U.S. at 353, 23 S.Ct. at 325-26 (emphasis on original).

[4]It is also contrary to the weight of authority in the analogous cigarette advertising context. *See Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 584-86 (D.C.D.C. 1971), *aff'd*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972) (upholding constitutionality of U.S.C. § 1335 forbidding cigarette advertising via electronic media).

consistently, and recently, noted the federal government's interest in protecting the health, safety, and welfare of its citizens. In *Rubin v. Coors Brewing Co.*, ____ U.S. ____, ____, 115 S.Ct. 1585, 1591, 131 L.Ed.2d 532 (1995), the Court struck down a federal statute prohibiting the display of alcohol content on beer labels. Analyzing the statute under *Central Hudson*, however, the Court found that the federal government's asserted interest, preventing strength wars over the content of alcoholic beverages, was substantial. *Rubin*, ____ U.S. at ____, 115 S.Ct. at 1591. The Court specifically acknowledged that the prevention of alcohol strength wars was aimed at "protecting the health, safety, and welfare of ... citizens...." *Id. See also Bolger v. Youngs Drug Products corp.*, 463 U.S. 60, 72-73, 103 S.Ct. 2875, 2882-84, 77 L.Ed.2d 469 (1983) (federal government had substantial interest in aiding parents in the upbringing of their children). The Broadcasters have cited no contrary authority, relying instead on an amalgam of general federalism statements.

[10] Taking as valid the federal government's interest in the health, safety, and welfare of its citizens, there remains only to be determined whether the goal of discouraging participation in gambling is substantial. *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), confirms that it is.

Posadas involved virtually identical facts. Although the commonwealth of Puerto Rico licensed and legalized casino gambling, it prohibited advertisements aimed at its own citizens in an attempt to discourage their participation in gambling. Upholding the constitutionality of the advertising prohibition, the Supreme Court's analysis of the second prong of the *Central Hudson* test was perfunctory: "We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health,

safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Id.* at 341, 106 S.Ct. at 2977. Likewise, this court has no difficulty in determining that the very same federal interest is substantial.

[11] The third and fourth prongs of the *Central Hudson* analysis concern the "fit" between the interest asserted and the means employed. Having been unable to dispel the substantial federal interests, the Broadcasters face a much more difficult challenge on the last two parts of the *Central Hudson* analysis They cannot seriously dispute that a prohibition of advertising casino gambling directly advances the governmental interest in discouraging such gambling and fulfills the third *Central Hudson* prong. It is axiomatic that the purpose and effect of advertising is to increase consumer demand. *See Posadas,* 478 U.S. at 342, 106 S.Ct. at 297; *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353. As noted in both *Posadas* and *Edge*, the vigor with which the statute has been challenged confirms the efficacy of the prohibition.

The Broadcasters complain that the various exceptions to section 1304[5] so emasculate the statute as to render it ineffective in advancing the governmental interest, and indeed calls into question the genuineness of the asserted governmental interest. The same type of argument was proffered, and rejected, in *Posadas*, 478

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[5]Excepted from section 1304's application are advertisements for 1) fishing contests, 18 U.S.C. § 1305; 2) wagers on sporting events, 18 U.S.C. § 1307(d); 3) state lotteries, 1307()(1), (2); 4) Indian gaming of all types, 25 U.S.C. § 2701; 5) charitable lotteries, 18 U.S.C. § 1307(a)(2)(A); 6) governmental lotteries, 18 U.S.C. § 1307(a)(2)(A); 7) occasional and ancillary commercial lotteries, 18 U.S.C. § 1307 (a)(2)(B).

U.S. at 342-43, 106 S.Ct. at 2977 (legislature need not forbid advertising for all games of chance to satisfy third prong of *Central Hudson*). The Court's striking down a prohibition of labelling the alcoholic strength of beer, in *Rubin, supra*, does not change this result. In that case, the Court cited a number of federal laws whose impact on the promotion of stronger alcoholic beverages varies and conflicts, and called the entire scheme irrational. ---- U.S. at ----, 115 S.Ct. at 1592. Because of these conflicts, the prohibition at issue could not achieve its purpose. That situation does not exist here. Congress has singled out particular forms of gaming for which broadcast advertising is permitted, and in so doing made legitimate, quintessentially legislative choices that the social costs of those activities were less than those of casino gambling, or the social benefits, e.g. of state-run lotteries, Indian and charitable gambling, were greater.[6] Needless to say, the statutory prohibition on broadcast advertising also reinforces the policies of states neighboring Louisiana, such as Texas, which do not permit casino gambling.

[12] The Broadcasters nevertheless argue that permitting other forms of media to advertise casino gambling undercuts the government's contention that section 1304 directly advances the asserted interests. This attack was rejected by the Supreme Court in *Edge*, ---- U.S. at ----, 113 S.Ct. at 2707. The Court explained:

> Nor do we require that the Government make

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[6]The alleged underinclusiveness of section 1304 is also advanced by the Broadcasters as a ground for disputing the substantiality of the federal interest, *Central Hudson's* second prong. We reject that attack for the reasons stated above, and note that in *Rubin*, the complexity of the statutory scheme was analyzed as part of the third *Central Hudson* factor. ____ S.Ct. at ____, 115 S.Ct. at 1592.

> progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced.

Id. See also Central Hudson, 447 U.S. at 569, 100 S.Ct. at 2353; *Dunagin v. City of Oxford*, 718 F.2d 738, 747-51 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 3554, 82 L.Ed.2d 855 (1984) (law prohibiting local liquor advertising directly advances government's interest in discouraging liquor consumption despite fact that residents are exposed to liquor advertising from out-of-state sources). Therefore, section 1304 easily satisfies the third prong of the *Central Hudson* test.[7]

[13, 14] The fourth requirement, that the restriction be no more extensive than necessary to serve the government's interest, is also met. This prong of *Central Hudson* is not, as the Fifth Circuit recently observed, a "least restrictive means" test, but requires only that the regulation's restrictions reasonably fit the desired objective. *Moore v. Morales*, 63 F.3d 358, 361 (5th Cir. 1995), citing *Florida Bar v. Went For It, Inc.*, ---- U.S., ----, ----, 115 S.Ct. 2371, 2379, 132 L.Ed.2d 541 (1995). *Posadas* is again compelling. The Supreme Court found it "clear beyond peradventure" that the challenged

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[7]Additionally, Congress is permitted ore intrusive regulation of the broadcast media than other forms of media. *See Turner Broadcasting System, Inc. v. FCC*, ___ U.S. ___, ___, 114 S.Ct. 2445, 2456, 129 L.Ed.2d 497 (1994); *Red Lion Broadcasting Co. v. FCC*. 395 U.S. 367, 388-9, 89 S.Ct. 1794, 1805-06, 23 L.Ed.2d 371 (1969).

Puerto Rican law satisfied the fourth *Central Hudson* prong. *Posadas*, 478 U.S. at 343, 106 S.Ct. at 2978. Section 1304 is equally tailored to the asserted governmental interests because it prohibits only broadcast advertising aimed at the promotion of casino gambling. To the extent public demand for casino gambling is reduced by section 1304, one governmental interest is fulfilled. To the extent the broadcasters cannot beam casino gambling advertisements into neighboring states that do not license private casinos, the federal government's goal of assisting states' anti-gambling policies is fulfilled. No less restrictive alternative seems viable in view of the ability of broadcast signals to cross state borders. In particular, the *Edge* "state choice" policy embodies a compromise that supports states' promotion of their own lotteries. Although Congress could craft a similar compromise for advertising of casino gambling, it has rejected that course, and we do not find it constitutionally mandated.

A final note. In *Edge*, the Court stated that gambling "falls into a category of 'vice' activity that could be, and frequently has been, banned altogether", ---- U.S. at ----, 113 S.Ct. at 2703, and clearly implied that advertising of gambling can lay no greater claim on constitutional protection than the underlying activity. *See also Posadas*, 478 U.S. at 345-46, 106 S.Ct. 2979; *Meyer v. Grant*, 486 U.S. 414, 424, 108 S.Ct. 1886, 1893, 100 L.Ed.2d 425 (1988). In *Rubin*, however the Court distanced itself from this position, ---- U.S. at ---- n. 2, 115 S.Ct. at 1589 n. 2. This is too bad. Drawing a distinction for traditional vice activity, such as gambling or prostitution, would provide a clear constitutional guideline, would free legislatures to make the delicate judgements required when legislating about these activities, and would avoid repetitious litigation over

Central Hudson in a limited category of cases. Clarity is a virtue seldom attained and too seldom even prized in constitutional law.

CONCLUSION

In summary, section 1304 and the concomitant FCC regulation constitutionally prohibit broadcast advertisements for casino gambling. The statute directly advances the government's substantial interests in discouraging public participation in such gambling and in enforcing states' anti-gambling policies in a manner no more extensive than necessary.[8] AFFIRMED.

POLITZ, Chief Judge, dissenting:

Persuaded that the values underlying the first amendment commercial speech doctrine compel rejection of a regulatory scheme riddled with such inconsistencies and exceptions as to result in suppression of speech without adequate justification, I must respectfully dissent.

As the Supreme Court has made abundantly clear, the first amendment protects the interest of the listener in the free flow of truthful, non-misleading commercial speech. The doctrine respects the individual's right to

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[8] *But see Valley Broadcasting Co.*, 820 F.Supp. at 525-27. In *Valley Broadcasting Co.*, the district court struck down as unconstitutional section 1304 finding that it did not directly advance the governmental interest asserted and was more extensive than necessary to serve the governmental interest. For the reasons stated above, we find that under a proper reading of *Central Hudson* and *Posadas*, section 1304 withstands constitutional scrutiny.

information relevant to the making of lawful choices[1] and to the formation and expression of opinions regarding governmental regulation of products or activities.[2]

The basis for the protection of commercial speech is not vitiated when the speech concerns lawful but potentially harmful activities, such as alcohol consumption or gambling.[3] When the government would forbid dissemination of information about things which legally may be done, the *Central Hudson* test ought be carefully conducted in order to protect these core first amendment values.

The government seeks to justify a nationwide ban on broadcasts of commercial messages discussing the gambling activities in state-licensed casinos. Given the social ills often associated with gambling, it cannot be gainsaid that the interests asserted in support of this ban are substantial. The *Central Hudson* test, however, requires that the government demonstrate that its interests

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[1]*Central Hudson Gas & Elec. Corp. va Public Serv. Comm'n of New York*, 447 U.S. 557, 562, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980) (rejecting "paternalistic" rationale for suppressing commercial speech in favor of view that people are capable of perceiving their own best interests if well-informed).

[2]*Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 78, 765, 96 S.Ct. 1817, 1827, 48 L.Ed.2d 346 (1973) ("[T]he free flow of commercial information is indispensable ... to the proper allocation of resources in a free enterprise system ... [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered.").

[3]The Supreme Court recently affirmed that restrictions on speech about legal "vices" are reviewed under the *Central Hudson* standard rather than by a more deferential approach. *Rubin v. Coors Brewing Co.*, ---- U.S. ----, ---- n. 2, 115 S.Ct. 1585, 1589 n. 2, 131 L.Ed.2d 532 (1995).

are *materially* advanced by the ban,[4] and that the ban is no more restrictive than necessary to serve that interest. Irrational regulatory scenarios in which certain provisions undermine and counteract the asserted government interest do not satisfy the "material advancement" prong of the *Central Hudson* test.[5]

The government claims an independent federal interest in discouraging public participation in commercial gambling. The restriction at bar is the awkward residual of 18 U.S.C. § 1304, originally enacted as section 316 of the Communications Act of 1934 to ban broadcast advertising of gambling. That ban is now deeply gutted by exceptions and in conflict with the policies of many states which have legalized gambling.[6] The broadcasters challenge the regulation to the extent it bans commercial broadcast messages directly referring to legal casino gambling.

A focusing of what can and cannot be done under the challenged regulation appears in order. Casinos are allowed to advertise their existence, to air the word "casino" as part of a legal name, and to refer to the non-gambling amenities within.[7] In instances where state-licensed casino gambling is advertised on billboards and

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[4]The "direct advancement" prong of *Central Hudson* is not satisfied by "mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, ---- U.S. ----, ----, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

[5]*Coors*, ---- U.S. at ----, 115 S.Ct. at 1592.

[6]An unofficial count reflects at least 21 states.

[7]*See, e.g.*, Letter to DR Partners, 8 F.C.C.R. 44 (1992).

in newspapers, where other legal gambling entities broadcast pro-gambling messages, and where casinos may broadcast their existence and the "excitement" to be had within, I suggest that a faithful application of *Central Hudson* compels the conclusion that the residual ban on broadcasting direct references to the games played in casinos amounts to little more than a gratuitous suppression of expression. Under these circumstances, and given the abundance of broadcast advertising for casinos, the challenged censorship serves little purpose. The government cannot show that this restriction decreases demand for casino gambling to any appreciable extent. While the government is not required, of course, to make progress on every front in advancing its interests, this ban is so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest. I am persuaded that the government has not met its burden of proving material advancement of its interest.

The government also asserts that the ban advances the federal interest in supporting policies of states which have chosen to prohibit casino gambling. Messages banned by the statute cannot be broadcast by any station licensed in the United States. Accordingly, residents of non-casino states cannot receive such messages from broadcasts originating in states where casino gambling is legal. Nor may residents of the casino states.

Recognizing a value in advancing the government's interest in aiding state anti-gambling policies, we must measure the extent of the restriction and weigh countervailing forces. The ban is nationwide. Some states allow casino gambling; some states do not. By not cabining the regulation to radio and television stations in non-casino states, the ban impinges unnecessarily on the policies of states which have legalized casino gambling.

A substantial federal interest in protecting state choice in gambling decisions, by limiting bans on lottery advertising to stations licensed by non-lottery states, was asserted and recognized in *United States v. Edge Broadcasting Co.*[8] The ban at bar is overboard and is inconsistent with the teachings of *Edge*, failing to accommodate the valid federalism interest inherent in supporting the casino-licensing states.[9]

Unlike the statutory scheme upheld in *Edge*, the ban before us allows stations in states where gambling is illegal to broadcast commercial messages promoting a gambling forum in another state, so long as the gambling activities taking place in that establishment are not explicitly referenced.[10] This "policy" simply magnifies the government's failure to prove material advancement of its interest in supporting the policies of non-casino states and guts its argument that a nationwide ban is mandated for an effective insulation of non-casino states from casino advertisements broadcast across state borders.

I respectfully dissent.

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[8]---- U.S. ----, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).

[9]In contrast, *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), presented the issue whether a state's restriction on commercial speech is necessary to a balance of its *own* competing interests, in promoting tourism while protecting its own population.

[10]Federal Communications Commission policy allows a station in a non-casino state to broadcast an advertisement promoting a casino so long as use of the word "casino" is confined to the establishment's proper name and other references to gambling are not explicit. *See, e.g.*, Letter to Calvenar Broadcasting, Inc., 8 F.C.C.R. 32 (1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL

VERSUS

UNITED STATES OF AMERICA, ET AL

Civ. No. 94-656
Section "C"

October 31, 1994

ORDER AND REASONS

This declaratory action comes before the Court on motion for summary judgment filed by the plaintiffs, Greater New Orleans Broadcasting association, Inc. ("broadcasters") and cross motion for summary judgment filed by the defendants, the United States of America and the Federal Communications Commission (collectively "FCC"), both parties having agreed that this matter can be determined summarily. Having considered the record, the memoranda of counsel and the law, the Court has determined that the motion of the plaintiffs should be denied and the motion of the defendant granted as submitted.[1]

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[1] However, in light of recent Fifth Circuit jurisprudence and despite the consensus herein, the Court will ask for further advice regarding the standard applicable to the First Amendment analysis, as explained hereinafter.

Three issues concerning broadcast restrictions on casino advertising are presented to this Court on cross motion: (1) whether a stay of enforcement by the FCC in Nevada violates the equal protection clause; (2) whether prohibitions against the broadcast of certain "lottery" information apply to casino gaming; and (3) whether those restrictions violate the plaintiffs' freedom of speech, due process rights, freedom to contract and equal protection of the law under the First Amendment. These issues largely reflect those presented in Valley Broadcasting v. United States, 820 F.Supp. 519 (D. Nev. 1993), wherein the district court granted summary judgment in favor of broadcasters and struck down the broadcast advertising restrictions imposed by statute and FCC regulations.[2] That decision focused on the First Amendment challenge and found that the FCC prohibitions did not directly advance substantial government interests and were unconstitutionally broad for purposes of the commercial speech analysis set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 446 U.S. 557 (1980).

EQUAL PROTECTION

The plaintiffs' equal protection claim is directed to the decision by the FCC to stay enforcement of the challenged broadcast regulations in Nevada pending appellate review of Valley Broadcasting. The plaintiffs do not dispute the fact that the stay was provoked by the district court decision, that the stay reduces uncertainty for those broadcasters within the state of Nevada or that the stay preserves FCC resources pending appeal. The

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[2] An appeal from that decision is pending in the United States Court of Appeals for the Ninth Circuit.

plaintiffs do argue that because this stay effectively classifies Nevada broadcasters differently than other broadcasters, the plaintiffs have been denied equal protection of the law. The proposed result: a nationwide stay of enforcement pending the appeal of the Valley Broadcasting decision.

The broadcasters ask for application of a strict scrutiny standard to the FCC's decision because it allegedly intrudes on the fundamental right of free speech. This standard would require a compelling interest be served by the FCC restrictions which cannot be served by an alternative and less burdensome means. However, in Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983), the Fifth Circuit specifically rejected the argument that strict scrutiny applies where commercial speech was involved.

> Furthermore, in all cases commercial speech in entitled to only a limited measure of protection under a different standard of review. Under the Central Hudson Gas test, the state must demonstrate a substantial interest which is directly advanced by the regulation. If the right to advertise for profits were fundamental, then parties to any particular commercial speech regulation could rely on a stricter standard of review -- requiring a compelling state interest and necessary means chosen to attain in -- by locating an unregulated class of advertisers and insisting on an equal protection analysis by the court.

Id., 718 F.2d at 752. The Fifth Circuit continued: "Hence, unlike other areas of First Amendment protection, the commercial speech doctrine is concerned primarily

with the level and quality of information reaching the listener." Id. The minimal scrutiny recognized by the Fifth Circuit in commercial speech equal protection cases requires that "the classification challenged need only be rationally related to a legitimate [governmental] interest." Id. 718 F.2d at 753. Without acknowledging Dunigan or this rule, the plaintiffs do alternatively argue that the FCC's stay in Nevada fails even the lesser "rational basis" test.

This Court recognizes the less rational basis standard as applicable to the equal protection challenge made in this matter, and finds that the FCC stay easily meets constitutional muster thereunder. For purposes of the lesser standard, the Court finds that the geographically limited FCC stay was rationally designed to accomplish a legitimate government goal.[3]

In addition, however, the Court finds that the FCC stay survives challenge under the stricter challenge applicable to speech entitled to full First Amendment protection. The allegedly offensive stay and resulting classification were based on the order of the district court. Obedience to the orders of the court is surely a compelling interest to all concerned. That obedience is secured by the contempt recognized upon violation. The stay accommodates the broadcasters in the state by providing a measure of certainty of the consequences of any actions. All concerned are spared from the anticipated deluge of individual declaratory actions

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[3] Similarly, the Court finds that the FCC action is not arbitrary, capricious or an abuse of discretion for purposes of review under 5 U.S.C. § 706 (2) (A).

seeking clarification of the scope of the order which has yet to be declared final.

It is important to note that the stay is temporary in nature and limited in scope. The Nevada district court does not enjoy nationwide jurisdiction; its order is without effect elsewhere. Its order is not final within its jurisdiction until affirmed upon appeal. Yet by virtue of the stay, those within the state of Nevada were served while those persons in all other states, including those states which do outlaw casino gambling, did not have to undergo an unnecessary and perhaps only temporary change of policy. In this regard, it should be noted that the right to unregulated casino advertising was recognized for the first time in Valley Broadcasting. Under the circumstances, the clarity and conservation sought by the government is a compelling interest which could have been accomplished in no other manner that this Court can imagine, and certainly in no other manner suggested by the plaintiffs.

STATUTORY APPLICATION

Next, the plaintiffs argue that casino gaming does not fall within the scope of the statute that empowers the FCC to regulate broadcasted advertising of casino gambling. That statute, 18 U.S.C. § 1304, provides in pertinent part:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise

> or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be [guilty of an offense against the United States].

[Emphasis added).[4] Specifically, the plaintiffs argue that this statute does not prohibit advertisement concerning casino gambling because casino games cannot be considered a "lottery, gift enterprise or similar scheme."

This argument has yet to receive judicial recognition, failed before the district court in Valley Broadcasting and fails again here. Those things that fall within the coverage of the statute share three characteristics: (1) the distribution of prizes; (2) according to change; (3) for consideration. F.C.C. v. American Broadcasting Co., 347 U.S. 284 (1954). It is clear that all of those characteristics are enjoyed by casino gambling, regardless of the treatment given by any state enactment.

FIRST AMENDMENT

The parties have grounded their First Amendment arguments on the Central Hudson analysis traditionally applied to restrictions on commercial speech.

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected

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[4] 47 C.F.R. § 73.1211 is a substantially similar rule being challenged in this matter.

> by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. For purposes of the first factor, there is no dispute here that the proposed speech would concern lawful activity and not be misleading.

Disagreement sharpens on the second prong of the analysis. The FCC contends that the government has a substantial interest (1) in protecting the interest of non lottery states and (2) in reducing participation in gambling and thereby minimizing the social costs associated therewith. The United States Supreme Court summarily recognized these interests in 1993 when it analyzed the right of radio stations in nonlottery states to broadcast lottery information in 1993:

> As to the second Central Hudson factor, we are quite sure that the Government has a substantial interest in supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries. As in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), the activity underlying the relevant advertising -- gambling -- implicates no constitutional protected right; rather, it falls into a

> category of "vice" activity that could be, and frequently has been, banned altogether.

United States v. Edge Broadcasting Co., 113 S.Ct. 2703 (1993).[5]

The plaintiffs maintain that the government interests cannot be deemed substantial because the number and nature of the statutorily recognized exceptions to the ban on lottery advertising have any alleged government interest existed "totally eviscerated." However, this argument leaves this Court without authority to disregard the Supreme Court's recent and clear message recognizing the substantiality of the government interests claimed here and in Edge Broadcasting.

The last two Central Hudson factors involve the consideration of the fit between the ends and the means chosen by the government. Edge Broadcasting advises that the third factor, whether the regulation directly advances the governmental interest asserted, has a broad focus.

> It is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is advanced directly as applied to a single person or entity. Even if there were no advancement as applied in that manner -- in this case as applied to Edge -- there would

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[5] It should be noted that the district court in Valley Broadcasting found that the government had a substantial interest in exercising their commerce clause powers in a manner cognizant of state choices with regard to gambling, but refused to continue to acknowledge the traditional link between gambling and vice without the benefit of the guidance offered in Edge Broadcasting.

> remain the matter of the regulation's general application to others -- in this case, to all other radio and television stations in North Carolina and countrywide.

Edge Broadcasting, 113 S.Ct. at 2704. In Edge Broadcasting, the FCC had adopted a policy which permitted licensed broadcasters located in lottery states to broadcast lottery information while prohibiting those located in nonlottery states from such advertising, despite the interstate reach of the airwaves. Again, the Supreme Court found that the FCC regulation directly served the governmental interest in balancing the interests of the lottery and nonlottery states.

Here, the FCC regulations do not prohibit the broadcast of all information concerning casino gambling in Louisiana and Mississippi. Broadcasted advertisement for the state authorized casinos is abundant. The plaintiffs acknowledge that under certain circumstances it is entirely lawful to broadcast casino advertisements. However, advertisements must pertain to the casino's amenities, such as food and rooms. Advertisements cannot promote the gaming aspect of casinos. For instance, under FCC regulations, the word "casino" may be broadcast in an advertisement only if made part of the name of the establishment, but information about certain contests at casinos cannot be broadcast.

The plaintiffs, however, promote the argument that because casino advertising is presented in other non-broadcast media to persons in Louisiana and Mississippi, the FCC prohibitions are ineffective. However, it is equally clear that casino advertising is presented in broadcast media as well, albeit subject to the specific FCC

rules. To the extent that the plaintiffs are arguing against the more intrusive regulation of broadcasting, this Court is mindful of the latest reaffirmation from the Supreme Court.

> The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.... In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806-1807. As we said in Red Lion, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id., 395 U.S. at 388, 89 S.Ct. at 1806; (other citations omitted).
>
> Although Courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence.

Turner Broadcasting System, Inc. v. F.C.C., 114 S.Ct. 2445, 2456-2457 (1994). Given the broad scope of this third Central Hudson factor and the continuing validity of enhanced broadcast regulation, the subject restrictions on the advertisement of casino gambling are materially indistinguishable form those which so directly served the government interest in Edge Broadcasting.

The fourth Central Hudson factor does focus on the application of the restrictions in determining whether the regulation is more extensive than necessary to serve the governmental interest. A reasonable fit is required. This requirement is met if the regulation promotes the government interest "provided that it did not burden substantially more speech than was necessary to further the government's legitimate interest." Edge, 113 S.Ct. at 2705, citing, Ward v. Rock Against Racism, 491 U.S. 781 (1989). The validity of the challenged restriction is measured by the relation it bears to the general problem represented by the government interest, not by the extent to which the prohibitions further that interest in an individual case. Id. This Court easily finds that the regulations governing broadcasted casino advertising have been narrowly constructed for purposes of this last factor.[6]

The plaintiffs argue that each of the subject regulations are a "broad-based, undifferentiating, unrestricted total gag." (Rec. Doc. No. 17, p. 40). However, in light of the prohibitions on casino advertising actually imposed, this characterization is simply not accurate. The fact is that broadcasted casino advertising is permitted, limited by the specific gaming-related limitations now imposed by the FCC. In addition, even if the validity of the restriction was to be measured only as to our broadcasters, the presently imposed restrictions effectively advance the governmental interest in a constitutionally narrow manner.

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[6] In this regard, the plaintiffs' motion to strike paragraph four of Greenberg's declaration relating to the interstate nature of broadcasting lacks merit.

In effect, the objections to the regulations being made by the plaintiff broadcasters were echoed in Edge Broadcasting and dismissed:

> Nor need we be blind to the practical effect of adopting respondent's view of the level of particularity of analysis appropriate to decide this case. Assuming for the sake of argument that Edge has a valid claim that the statutes violated Central Hudson only as applied to it, the piecemeal approach it advocates would act to vitiate the Government's ability generally to accommodate States with differing policies ... Because the approach Edge advocates has no logical stopping point once state boundaries are ignored, this process might be repeated until the policy of supporting [the nonlottery state's] ban on lotteries would be seriously eroded. We are unwilling to start down that road.

Edge Broadcasting, 113 S.Ct. at 2701.

In sum, the remaining limitations are reasonably fit to the recognized government interest both in design and in scope for purposes of the Central Hudson evaluation. The remaining restrictions imposed by the FCC are minor and constitutionally valid.

APPLICABLE STANDARD

The Court joins the parties in recognizing the application of Central Hudson to the First Amendment analysis herein. It notes that Edge Broadcasting unhesitantly applied that traditional test to the same statute and similar regulations. However, the Fifth Circuit

has recently questioned that application in a commercial speech case where content-based restrictions are involved. MD II Entertainment, Inc. v. City of Dallas, Texas, 28 F.3d 492 (5th Cir. 1994). Specifically, the Fifth Circuit referenced R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538 (1992), as questioning the general application of Central Hudson to all commercial speech cases.

The Court recognizes the fact that R.A.V. preceded Edge Broadcasting an that Edge Broadcasting did not rely on R.A.V.'s analysis at all. That is extremely persuasive evidence that Central Hudson is the correct standard here. However, because of the suggestion in MDII, the Court will seek the further advice or consensus of counsel.

Accordingly,

IT IS ORDERED that the Plaintiffs' motion to strike paragraph four of Greenberg's declaration is DENIED.

IT IS FURTHER ORDERED that counsel advise the Court **in writing** no later than November 7, 1994, whether issue exists regarding the standard to be applied to the First Amendment analysis.

New Orleans, Louisiana, this 31 day of October, 1994.

s/ Ginger Berrigan, UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
BERRIGAN, J.
NOVEMBER 29, 1994

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL

VERSUS

UNITED STATES OF AMERICA

CIVIL ACTION NO. 94-656
SECTION "C"

In its previously-issued Order and Reasons, the Court applied the standard set forth by the United States Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission, 466 U.S. 557 (1980) to assess the constitutionality of the subject government regulations under the First Amendment. All parties had previously agreed to the application of the Central Hudson to the First Amendment issues presented herein. Although the Court agreed that the Central Hudson standard was appropriate, it asked for supplemental advice from counsel regarding MD II Entertainment, Inc. v. City of Dallas, Texas, 28 F. 3d 492 (5th Cir. 1994), in which the Fifth Circuit questioned the general application of Central Hudson.

Having further considered the issue, the Court maintains that Central Hudson is the appropriate standard. As previously noted, the Supreme Court did not vary application of that standard in United States v. Edge Broadcasting Co., 113 S. Ct. 2703 (1993), which dealt with the same statute at issue here and which was decided after R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct.

2538 (1992). Contrary to the plaintiffs' suggestion, the opinion of the Supreme Court in Edge Broadcasting cannot be ignored and is considered sound guidance by this Court.

Further, as noted by the defendants in supplemental brief, the Fifth Circuit itself stated in MD II that Central Hudson continues to govern content-neutral regulations of commercial speech. In so doing, it noted Edge Broadcasting and the appropriateness of the application of Central Hudson therein. Again, Edge Broadcasting involved a challenge to the same statute as at issue here. MD II, 28 F. 3d at 495, fn. 14.

Accordingly, and for the reasons previously issued,

IT IS ORDERED that judgment be entered in favor of defendants and against the plaintiffs dismissing the plaintiffs' claims with prejudice, each party to bear its own costs.

s/ Ginger Berrigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL

VERSUS

UNITED STATES OF AMERICA, ET AL

CIVIL ACTION NUMBER 94-0656
SECTION: "C"

JUDGMENT

The Court having denied the plaintiffs' motion for summary judgment and granted the defendants motion for summary judgment; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, United States of America and Federal Communications Commission and against plaintiffs, Greater New Orleans Broadcasting Association, Incorporated, individually and on behalf of its members, Phase II Broadcasting, Inc., Radio Vanderbilt, Inc., Keymarket of New Orleans, Inc., Professional Broadcasting, Inc., WGNO, Inc. and Burnham Broadcasting Company, a Limited Partnership, dismissing plaintiffs' claims with prejudice, each party to bear its own costs.

New Orleans, Louisiana this 30th day of November, 1994.

s/Ginger Berrigan, U.S. DISTRICT JUDGE

18 USC § 1304

Broadcasting lottery information. - Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in while or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or al of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

18 USC § 1305

Fishing Contests. - The provisions of this chapter shall not apply with respect to any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or qualify of fish caught by contestants in any bona fide fishing or recreational event.

18 USC § 1307

Exceptions relating to certain advertisements and other information and to State-conducted lotteries. - (a) The provisions of Sections 1301, 1302, 1303, and 1304 shall not apply to --

(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is --

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, lit of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is --

(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(b) The provisions of Sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law.

(c) For the purposes of this section "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(d) For the purposes of subsection (b) of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by change to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a "not-for-profit organization" means any organization that would qualify as tax exempt under Section 501 of the Internal Revenue Code of 1986.

47 Code of Federal Regulations § 73.1211
Broadcast of Lottery Information

(a) No licensee of an AM, FM, or television broadcast stations, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes. (18 U.S.C. 1304, 62 Stat. 763).

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or other thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or other thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question. (See 21 FCC 2d 846).

(c) The provisions of paragraphs (a) and (b) of this section shall not apply to an advertisement, lit of prizes or other information concerning:

(1) A lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in that State or any other State which conducts such a lottery. (18 U.S.C. 1307(a); 102 Stat. 3205).

(2) Fishing contests exempted under 18 U.S. Code 1305 (not conducted for profit, *i.e.*, all receipts fully consumed in defraying the actual costs of operation).

(3) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*).

(4) A lottery, gift enterprise or similar scheme, other than one described in paragraph (c)(1) of this section, that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization (18 U.S.C. 1307(a); 102 Stat. 3205); or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization. (18 U.S.C. 1307(a); 102 Stat. 3205).

(d)(1) For purposes of paragraph (c) of this section, "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting events or contests.

(2) For purposes of paragraph (c)(4)(i) of this section, the term "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

[40 FR 6210. Feb. 10, 1975, as amended at 45 FR 6401, Jan. 28, 1980; 54 FR 20856, May 15, 1989, 55 FR 18888, May 7, 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30732

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, ET AL.,
Plaintiffs-Appellants
versus

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION;
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion) _____ 5 Cir., _____, __ F.3d _____)

(January 23, 1996)

Before Politz*, Jones, and Parker, Circuit Judges.

PER CURIAM:
(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service

on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of this Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc in DENIED.

ENTERED FOR THE COURT:

s/EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

*Politz, Chief Judge, dissented and filed opinion.

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JUN 20 1996
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No. 95-1708

In the Supreme Court of the United States

OCTOBER TERM, 1995

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether 18 U.S.C. 1304, which prohibits the broadcasting of advertisements for "any lottery, gift enterprise, or similar scheme," violates the First Amendment as applied to broadcast advertisements for legal casino gambling.

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In the Supreme Court of the United States

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GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL., PETITIONERS

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UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 69 F.3d 1296. The opinion of the district court (Pet. App. 19a-31a) is reported at 866 F. Supp. 975.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1995. A petition for rehearing was denied on January 23, 1996. The petition for a writ of certiorari was filed on April 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1304 of Title 18 prohibits television and radio stations licensed by the Federal Communications Commission (FCC) from broadcasting advertisements for "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance."[1] Section 1304 is part of a long-standing body of federal restrictions on interstate commerce involving lotteries and related gambling activities. 18 U.S.C. 1301-1307; 39 U.S.C. 3001, 3005; see generally *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421-423 (1993) (discussing statutory history). Section 1304 was enacted in 1934 to complement existing restrictions on the distribution of lottery advertising and paraphernalia through the mails and other forms of interstate transportation. See 18 U.S.C. 1301 (interstate transportation), 1302 (mail); 39 U.S.C. 3001(a), 3005 (mail).

Section 1304 is a criminal statute. The government's practice, however, has not been to bring criminal prosecutions for violations of the statute. Instead, the advertising restriction has been enforced administratively by the FCC, which has adopted

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[1] Section 1304 provides in pertinent part:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, * * * any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

a regulation subjecting broadcasters to the same restriction. See 47 C.F.R. 73.1211(a).[2]

By its terms, Section 1304 applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954), this Court construed that language to encompass any undertaking involving "(1) the distribution of prizes; (2) according to chance; (3) for a consideration." *Id.* 290. That formulation encompasses most if not all kinds of gambling activities that take place in casinos, and Section 1304 has therefore been understood to apply to advertising for casino gambling as well as "lotteries" in the more traditional sense.[3]

In recent years, Congress has enacted several exceptions to Section 1304. In 1976, Congress adopted a partial exemption for state lotteries, allowing the broadcasting of advertisements for state lotteries in States that conduct such lotteries. 18 U.S.C. 1307(a)(1). In 1988, Congress adopted exemptions for broadcast advertisements for Indian gambling, charitable gambling, and government-conducted gambling

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[2] Section 73.1211(a) provides in pertinent part:

> No licensee of an AM, FM, or television broadcast station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes.

[3] In the proceedings below, petitioners contended that Section 1304 does not apply to casino gambling. The district court and the court of appeals both rejected that statutory argument (Pet. App. 4a-5a, 23a-24a), and petitioners do not renew it here.

other than state lotteries. 18 U.S.C. 1307(a)(2)(A); 25 U.S.C. 2720.[4] The FCC has made corresponding changes in its regulation. See 47 C.F.R. 73.1211(c). However, Congress has specifically rejected proposals to allow broadcast advertising for legal casino gambling. See 134 Cong. Rec. 12,278-12,282 (1988) (House); *id.* at 31,073-31,076 (Senate).[5]

2. Petitioners are New Orleans, Louisiana, television and radio stations that desire to broadcast ads for Louisiana and Mississippi casino gambling. They commenced this action in February 1994, contending that Section 1304, as applied to broadcast advertising for casino gambling in States where casino gambling is legal, violates the First Amendment. Pet. 8.[6]

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[4] Congress has also adopted exceptions for advertising related to promotional activities (*e.g.*, an auto dealership's car raffle); certain fishing contests; and sporting events. See 18 U.S.C. 1305, 1307(a)(2)(B), 1307(d).

[5] As originally proposed, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307), would have removed advertising restrictions on all lotteries allowed under state law, including commercial casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). The House of Representatives, however, adopted an amendment that specifically excluded casino gambling from the bill, over the objections of representatives from Nevada and New Jersey. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee emphasized that "no provision of [the bill] is intended to change current law as it applies to the interstate advertising of professional gambling activities." *Id.* at 31,075.

[6] Petitioners do not claim that Section 1304 interferes with news reporting or other non-commercial speech. Although Section 1304 refers to the broadcasting of "advertisement[s] of or information concerning" lotteries, the Federal Communications Commission and the courts have construed the reference

Petitioners' challenge was based on the First Amendment principles recognized in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and its progeny. *Central Hudson* subjects legislative restrictions on commercial speech to a four-part inquiry: (1) whether the speech concerns lawful activity and is not misleading, and (2) if so, whether the asserted governmental interest for the regulation is substantial; and if so, (3) whether the regulation "directly advances" the asserted interest and (4) whether it is no more extensive than is necessary to serve that interest. *Id.* at 566. In *Edge*, *supra*, this Court applied that four-part test to the federal regulation of state lottery advertising; the Court upheld the scheme's provisions whereby stations in States that conduct lotteries may broadcast lottery advertisements, while stations in non-lottery States may not. 509 U.S. at 426-435.

Petitioners and respondents filed cross-motions for summary judgment regarding the constitutionality of Section 1304. Relying on the principles articulated in *Edge*, *supra*, the district court entered summary judgment in favor of respondents. Pet. App. 19a-31a.

3. The court of appeals affirmed. Pet. App. 1a-18a. For purposes of review under *Central Hudson*, the government advanced two distinct interests that are served by Section 1304. The first is an interest in assisting States that have chosen to prohibit casino gambling and other "lotteries" covered by Section 1304. The second is an independent federal interest in

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to "information" not to apply to non-commercial speech such as news reporting. See *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990, 993-994, 997 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970).

discouraging public participation in gambling and thereby minimizing gambling's attendant social ills. The court held that both of those interests are "substantial" for purposes of the second prong of *Central Hudson*. Pet. App. 6a-10a.

The court further determined that Section 1304 directly advances those interests and is no more restrictive than necessary, thereby satisfying the third and fourth prongs of the *Central Hudson* test. Pet. App. 10a-13a. As to the third prong, the court explained that this Court's cases have expressly recognized that "the purpose and effect of advertising is to increase consumer demand," and it noted that "the vigor with which the statute has been challenged confirms the efficacy of the prohibition." *Id.* at 10a. Relying on *Edge*, the court rejected petitioners' claim that the ban does not directly advance the government's interest, because the government permits other forms of media to advertise casino gambling; as the court explained, quoting *Edge*, the government is not "require[d] * * * to make progress on every front before it can make progress on any front." *Id.* at 11a-12a.

As to the fourth prong of the *Central Hudson* test, the court noted that it is not a "least restrictive means" test, but one that requires "only that the regulation's restrictions reasonably fit the desired objective." Pet. App. 12a. Because Section 1304 is "equally tailored" to its objectives as the restrictions that this Court upheld in *Edge* and in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the court found that Section 1304 satisfies the fourth *Central Hudson* prong. Pet. App. 12a-13a.

Chief Judge Politz dissented. Pet. App. 14a-18a. He believed that the statutory exceptions to Section 1304 prevent the statute from directly advancing the government's interests, and that the application of the statute to broadcast advertising in States that permit casino gambling is unduly restrictive. *Id.* at 14a-18a.[7]

ARGUMENT

1. On May 13, 1996, after the petition was filed, this Court struck down on First Amendment grounds two Rhode Island statutes that prohibited the advertising of retail liquor prices. See *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996). *44 Liquormart* produced four separate opinions, each of which found the Rhode Island statutes unconstitutional, but none of which commanded a majority of the Court regarding the appropriate First Amendment standards for government regulation of commercial speech.

Justice Stevens wrote the lead opinion, which was joined in full by Justices Kennedy and Ginsburg and in part by Justices Scalia, Souter, and Thomas. 116 S. Ct. at 1501-1515. Justice Stevens concluded that the Rhode Island statutes failed to satisfy the third and fourth prongs of the *Central Hudson* test. *Id.* at 1508-1510 (Part V) (joined by Kennedy, Souter & Ginsburg, JJ.). Justice Stevens, however, advocated the adoption of stricter constitutional standards than those of *Central Hudson* for laws, such as the Rhode Island statutes, that "entirely prohibit[] the dissemination of truthful, nonmisleading commercial

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[7] Another case raising the same First Amendment claim, brought by Nevada television stations, is currently pending before the court of appeals for the Ninth Circuit. *Valley Broadcasting Co.* v. *United States*, No. 93-16191 (argued Feb. 15, 1995).

messages for reasons unrelated to the preservation of a fair bargaining process." *Id.* at 1507-1508 (Part IV) (joined by Kennedy & Ginsburg, JJ.).

Justice O'Connor, joined by the Chief Justice and Justices Souter and Breyer, concurred in the judgment. 116 S. Ct. at 1520-1523. Justice O'Connor agreed with the lead opinion that the Rhode Island statutes failed to satisfy the fourth prong of *Central Hudson*. *Id.* at 1521-1522. Unlike the lead opinion, however, Justice O'Connor declined to depart from the *Central Hudson* test. *Ibid.*

Justice Scalia and Justice Thomas wrote separate opinions concurring in part and concurring in the judgment. Justice Scalia agreed that the Rhode Island statutes were unconstitutional under *Central Hudson*, but expressed the view that the scope of First Amendment protections for commercial speech should conform to the "long accepted practices of the American people." 116 S. Ct. at 1515. Justice Thomas called for a rule of *per se* unconstitutionality for advertising restrictions designed "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Id.* at 1515-1520.

2. In several respects, *44 Liquormart* casts new light on the First Amendment issues decided by the court of appeals. While none of the opinions in *44 Liquormart* commanded a majority of the Court regarding the general standards of First Amendment protection for commercial speech, the opinions do clarify the Court's prior commercial speech precedents in several respects. For example, the lead opinion of Justice Stevens and Justice O'Connor's concurring opinion both indicate that a blanket ban on commercial speech will ordinarily not survive scrutiny under the fourth prong of *Central Hudson* if

the interests advanced in support of the ban can be served equally well by alternative, non-speech-related means. See 116 S. Ct. at 1510 (Part V) (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); *id.* at 1521-1522 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ.). Similarly, the lead opinion and Justice O'Connor's concurrence both question the continued authority of *Posadas de Puerto Rico*, *supra*, regarding judicial deference to legislative choices between commercial speech restrictions and other means of reducing consumption of legal products. See *id.* at 1511 (Part VI) (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.); *id.* at 1522 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ.).

Because the court of appeals did not have the benefit of this Court's views in *44 Liquormart*, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further consideration, as it did in two recent cases raising commercial-speech issues. See *Hospitality Investments of Philadelphia, Inc.* v. *Pennsylvania State Police*, No. 94-1247 (May 20, 1996) (remanding for further consideration in light of *44 Liquormart*); *Anheuser-Busch, Inc.* v. *Schmoke*, No. 95-685 (May 20, 1996) (same). In suggesting that the Court remand this case, we do not mean to imply that the decision of the court of appeals is erroneous, or that *44 Liquormart* renders Section 1304 unconstitutional in any respect. *44 Liquormart* sheds additional light on the First Amendment issues in this case, however, and it is appropriate for the court of appeals in the first instance to reconsider those issues in light of the guidance that may be drawn from *44 Liquormart*.

CONCLUSION

The petition for writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996).

Respectfully submitted.

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JUNE 1996

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Supreme Court, U.S.
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No. 95-1708

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC.
individually and on behalf of its members;
PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,
Petitioners

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

On April 22, 1996, Petitioners, Greater New Orleans Broadcasters Association, Inc., along with several of its members (collectively "Broadcasters"), filed a Petition for a Writ of Certiorari, seeking review of a judgment by the United States Court of Appeals for the Fifth Circuit upholding the federal government's ban on broadcast advertisements concerning casino gaming. On May 13, 1996, the Court issued a decision in *44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. v. Rhode Island and Rhode Island Liquor Stores Association*, No. 94-1140, 1996 U.S. Lexis 3020 (May 13, 1996). The *44 Liquormart* decision provides additional substantial support for the arguments made by Broadcasters in their Petition. Broadcasters contend that, in light of *44 Liquormart*, this matter is appropriate for summary disposition pursuant to Supreme Court Rule 16.1, vacating the judgment rendered by the appeals court and remanding for further consideration in light of *44 Liquormart*.[1] Pursuant to Supreme Court Rule 15.8, Broadcasters hereby submit this Supplemental Brief in order to review the effect of *44 Liquormart* on the issues presented in this matter.

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[1] Shortly after the Court issued its decision in *44 Liquormart*, it vacated and remanded two other lower court decisions that had upheld other commercial speech restrictions. *Anheuser-Busch, Inc., et al. v. Schmoke, Mayor, et al.*, No. 96-685, 1996 U.S. Lexis 3268 (May 20, 1996); *Hospitality Investments of Philadelphia, Inc. v. Pennsylvania State Police Bureau of Liquor Control Enforcement*, No. 94-1247, 1996 U.S. Lexis 3267 (May 20, 1996). In both of those cases, the restrictions had been justified on the basis of paternalistic concerns analogous to those advanced in *44 Liquormart* and here, and in both of those cases, the record reflected a marked lack of evidence supporting the effectiveness of the restrictions under review. Broadcasters submit that this matter is appropriate for summary disposition in the same manner.

1. The Court's reasoning in *44 Liquormart* is applicable to this case.

In *44 Liquormart*, the Court considered a challenge by a liquor store to a Rhode Island statute that forbids advertisements for liquor that feature price information. The state defended the statute as a means of promoting temperance. All nine Justices agreed that the statute violated the First Amendment. The dispute at hand is directly analogous to the one that the Court considered in *44 Liquormart*. Here, as in *44 Liquormart*, the speech restrictions under review concern truthful, non-misleading advertisements for a lawful activity. More significantly, the speech restrictions at issue in this matter, like those under review in *44 Liquormart*, have been justified by the government on the basis of nonspeech policies unrelated to the preservation of a fair bargaining process. Here, as in *44 Liquormart*, the appeals court found inherent merit in the government's arguments that the restrictions at issue would achieve the government's identified goals and therefore did not require the government to adduce specific facts to demonstrate the effectiveness of the restrictions.

Writing the principal opinion in *44 Liquormart*, Justice Stevens stated that regulations that suppress commercial speech in order to pursue a policy not related to consumer protection must be reviewed with "special care." *44 Liquormart, supra* at 28 (citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977); *Carey v. Population Services International*, 431 U.S. 678, 701, n. 28 (1977)). He pointed out that, although the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. *Id.* at 30 (citing *Central Hudson Gas & Electric Corp.*

v. Public Service Commission of New York, 447 U.S. 557, 566, n. 9 (1977)). Justice Stevens found that the appeals court erred in assuming that all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. *Id.* at 31. "The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *Id.* (citing *Rubin v. Coors Brewing Company*, 514 U.S. ____, ____ (Slip op., at 1-3)). "When a State regulates commercial messages to protect consumers from misleading, deceptive or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a state entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.*

In addition, Justice Stevens specifically stated that the Court's treatment of a state-imposed ban on gaming advertising in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986), was erroneous inasmuch as it found that such a ban represented a permissible exercise of legislative judgment. *Id.* at 45. "We conclude that a state legislature does not have the broad discretion to suppress truthful nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *Id.* at 46. He concluded that speech prohibitions

of this type "rarely survive constitutional review." *Id.* at 36 (citing *Central Hudson*, 447 U.S. at 566, n. 9).[2]

The reasoning of the principal opinion in *44 Liquormart* is entirely applicable to the matter at hand. Here, the government has asserted that the purpose of its restrictions is to suppress public participation in lawful casino gaming and to bolster the policies of those states that prohibit such gaming at the expense of the policies of the numerous states that permit it. Thus, the restrictions at issue here do not serve the fundamental interest in ensuring a fair bargaining process that *44 Liquormart* identified. Instead, the restrictions serve nonspeech policies that could be directly implemented without regulating speech (for example, by a federal ban on casino gaming). As Justice Stevens noted, "these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy." *Id.* at 33 (citing *Central Hudson,* 447 U.S. at 575, n. 13). As such, the government's advertising ban "rest[s] solely on the offensive assumption that the public will respond

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[2] Justice Scalia, writing separately, expressed discomfort with the *Central Hudson* analysis but concurred with Justice Stevens that the restrictions under review could not survive application of the 4-part *Central Hudson* test. *44 Liquormart, supra* at 58-60. Justice Thomas went further than the principal opinion in his criticism of paternalistic suppression of commercial speech, stating, "In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in [*Central Hudson*] should not be applied, in my view. Further, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech." *Id.* at 60-61. Justice O'Connor wrote separately in a concurring opinion joined by Chief Justice Rehnquist and Justices Souter and Breyer. She questioned what she perceived to be displacement of the traditional *Central Hudson* analysis embodied in the principal opinion, but found that the government's speech restrictions could not pass even a less rigorous application of that analysis. *Id.* at 82-83.

'irrationally' to the truth." *Id.* at 35 (citing *Linmark*, 431 U.S. at 96).

2. The lower court's analysis is inconsistent with *44 Liquormart*.

In light of the facially paternalistic basis for the government's ban on casino gaming advertising, the review of the ban provided by the appeals court is wholly inadequate to address the concerns articulated by the Court in *44 Liquormart*. The appeals court simply concluded that the government, in promulgating its arbitrary array of speech restrictions concerning gaming, "made legitimate, quintessentially legislative choices." Pet. App. 11a. In reaching this conclusion, the appeals court relied on the rationale of *Posadas*, which was explicitly rejected in *44 Liquormart*. Pet. App. 9a. Thus, in upholding the arbitrary ban, the level of the lower court's scrutiny fell far short of that required by the Court in *44 Liquormart*. For this reason, the Court should summarily vacate the lower court's judgment and remand this matter for reconsideration in light of *44 Liquormart*.

44 Liquormart also buttresses Broadcasters' argument that, in upholding the government's ban on truthful commercial speech about gaming, the lower court failed to demand the required proof of the ban's effectiveness. In rejecting Rhode Island's arguments concerning the efficacy of its speech restrictions, Justice Stevens stated that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." *Id.* at 38. Moreover, he specifically found that the mere fact that the plaintiffs had challenged the restrictions in no way provided evidence of

their effectiveness. *Id.* at 39, n.16. He refused to engage in "the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the state takes aim at accurate commercial information for paternalistic ends." *Id.* at 40-41 (citations omitted). In this case, the lower court reviewed a record devoid of any testimony whatsoever regarding the effectiveness of the government's ban on casino gaming advertising. Instead, the court relied upon speculation and conjecture of the sort rejected in *44 Liquormart* to conclude that the subject restrictions materially advance the paternalistic ends laid out by the government. In addition, the lower court improperly relied upon Broadcasters' challenge to the ban as evidence of its effectiveness. Pet. App. 10a. Such reasoning is entirely inconsistent with the guidelines set forth by the Court in *44 Liquormart* and provides an additional reason why the Court should vacate the lower court's judgment.[3]

Finally, Justice Stevens specifically refused to permit less rigorous scrutiny of speech restrictions deemed by the government to pertain to "vice" activities, pointing out that "such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or

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[3] It is noteworthy that the principal opinion, in considering *United States v. Edge Broadcasting Company*, 509 U.S. 418 (1993), distinguished it from *44 Liquormart* by simply noting that in *Edge* the statute at issue was designed to regulate advertising about an activity that had been deemed illegal in the advertiser's jurisdiction. Here, as in *44 Liquormart*, the government's ban aims to suppress speech about an activity that is entirely lawful in Broadcasters' jurisdictions. As Broadcasters pointed out in their Petition, the Court's opinion in *Edge* is consistent with Broadcasters' arguments and provides an additional reason to vacate the lower court's judgment.

playing cards, that may be lawfully purchased on the open market." *Id.* at 53. Here, the lower court made its erroneous support of such a lesser standard of review apparent in its opinion. Pet. App. 14a. Under these circumstances, the Court should vacate the lower court's judgment and remand to the lower court to correct the troublesome precedent that its judgment establishes.

3. Conclusion.

For the foregoing reasons the Court should vacate the judgment of the court of appeals and remand this matter for reconsideration in light of *44 Liquormart*.

Respectfully submitted,

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